UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

CENTER FOR INDEPENDENCE OF THE DISABLED, NEW YORK, a nonprofit organization, BROOKLYN CENTER FOR INDEPENDENCE OF THE DISABLED, a nonprofit organization, BRONX INDEPENDENT LIVING SERVICES, a nonprofit organization, HARLEM INDEPENDENT LIVING CENTER, a nonprofit organization, DISABLED IN ACTION OF METROPOLITAN NEW YORK, a nonprofit organization, NEW YORK STATEWIDE SENIOR ACTION COUNCIL, a nonprofit organization, SASHA BLAIR-GOLDENSOHN, an individual, CHRIS PANGILINAN, an individual, and DUSTIN JONES, an individual, on behalf of themselves and all others similarly situated, Plaintiffs, -against- METROPOLITAN TRANSPORTATION AUTHORITY, a public benefit corporation, VERONIQUE HAKIM, in her official capacity as interim executive director of the Metropolitan Transportation Authority, NEW YORK CITY TRANSIT AUTHORITY, a public benefit corporation, DARRYL C. IRICK, in his official capacity as acting president of the New York City Transit Authority, and THE CITY OF NEW YORK, Defendants.	No. 17-cv-2990 (GBD)

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

I. INTRODUCTION

This case challenges the Metropolitan Transportation Authority's ("MTA's") failure to maintain the elevators that provide access to the subway system, resulting in frequent, unexpected outages and other access barriers that have the effect of excluding passengers with disabilities. The New York City (the "City") subway system has long been called the lifeblood of the City. Yet, every year, millions of New Yorkers and visitors whose disabilities prevent them from using stairs are cut off from that lifeblood because of the near-constant disrepair that renders subway station elevators—which are too few in number to begin with—unpredictably and frequently unusable. Compounded by the MTA's failure to provide adequate accommodations in the all-too-frequent case of elevator dysfunction, this systemic disrepair of elevators effectively excludes people with disabilities from meaningful access to the subway system, undoubtedly one of the most important services the MTA offers.

The significance of the MTA's subway system to New Yorkers' everyday lives is virtually impossible to overstate. Totaling up to six million rides daily and nearly 1.8 billion rides annually, the New York City subway system completely dominates all other transportation options and is the most frequently used metropolitan transit system in the entire Western world. Its unparalleled popularity among the City's residents is the direct result of the efficiency and reliability with which it covers hundreds of locations across the City. Without the subway, millions of people would struggle to accomplish such vital everyday tasks as commuting to work, attending school, accessing healthcare and other services, and taking part in social, civic and cultural events.

The sheer fact that 76 percent of subway stations are entirely inaccessible is by itself a monumental barrier for the hundreds of thousands of New Yorkers whose disabilities prevent them from using stairs. This already limited access makes proper programmatic maintenance of

the elevators at the remaining 24 percent of stations that provide the sole points of access to the subway for class members especially crucial.

The MTA's failure to merely follow its own elevator maintenance program is reflected in a wide variety of undisputed evidence. This evidence includes a 2017 New York City Comptroller study finding that 80 percent of the elevators and escalators failed to receive all scheduled preventative maintenance. Three other studies, two commissioned by the MTA, bolster the Comptroller's finding that the MTA's elevator maintenance practices are patently inadequate, causing frequent and unnecessary outages. And the MTA admits that it fails to replace elevators at the rate necessary to keep them functioning in a state of good repair and that it fails to employ enough staff to adequately maintain them. The result is to be expected: a high frequency of unplanned elevator outages and elevator entrapments, chronically broken accessibility and safety features, and unsanitary elevator conditions.

These failures are particularly glaring when contrasted with the "special concern" with which MTA views its "Non-Accessibility elevators." These elevators serve MTA's non-disabled customers in deep underground stations, where they provide necessary access to an intermediate mezzanine, after which passengers must take at least one additional flight of stairs in order to reach the subway platform. Tellingly, the MTA prioritizes the operability and condition of these Non-Accessibility elevators by engaging outside contractors for their maintenance, prioritizing them for capital replacement, and assigning full-time operators to ensure their continuous cleanliness. Their failure to demonstrate similar care and concern for Accessibility Elevators demonstrates the MTA's blatant disregard for, and discrimination against, elevator-dependent passengers. The impact is immense: As Plaintiffs' experiences uniformly reflect, poorly maintained subway elevators impede their ability to make it to their jobs, socialize with friends,

effectively care for their children, obtain necessary services, and to generally conduct their daily activities without considerable stress, frustration and even fear for their safety.

This exclusion from one of the City's most vital services violates class members' rights under both federal and New York City civil rights laws. This programmatic failure violates the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* ("ADA") and its implementing regulations, specifically the requirement to maintain "those features of facilities … that are required to make … facilities readily accessible" in "operative condition" with only "isolated or temporary interruptions" permitted, 49 C.F.R. § 37.161. It likewise violates Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.* ("Section 504"), and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 *et seq*. ("NYCHRL"), making a grant of partial summary judgment declaring the MTA liable eminently warranted.

II. PROCEDURAL HISTORY

Plaintiffs, individuals and organizations of individuals with disabilities, filed this case on April 25, 2017. Complaint, ECF No. 1. Judge Forrest certified the class on November 3, 2017, by stipulation of the parties; the class definition is "all persons who use or seek to use the New York City subway system, and have a disability that requires them to use an elevator to access the subway system." Stipulation and Order, ECF No. 63. Fact discovery ended in September 2018, and expert discovery closed on July 5, 2019. At a court conference on May 2, 2019 Judge Daniels ordered dispositive motions to be filed by August 9, with oppositions due September 13 and replies September 30.

III. STATEMENT OF FACTS

A. The Subway Is Crucial to New Yorkers' Everyday Lives

The high ridership figures for the New York City subway attest to its central role in the everyday lives of millions of New Yorkers. In 2017 alone, the MTA provided 2.5 billion trips

over 13 billion miles. Pls.' Statement of Undisputed Facts (hereinafter "SOF") ¶ 2. The subway's popularity is easily traced to the vital benefits it provides to its riders, including travel at speeds up to 50 miles per hour; efficient and extensive coverage of many parts of the City; the ability to carry a very large number of riders at once; frequency of service, which is often spaced out by mere minutes; availability twenty-four hours a day and seven days a week; relatively low fares; and freedom from surface obstructions such as traffic jams or hazardous weather conditions. It would indeed be impossible to imagine life in the City without this iconic service that millions of people depend on for all facets of their lives.

For all New Yorkers, including class members, there is no true substitute for the New York City subway. The MTA itself admits that its bus service, drastically reduced in recent years, cannot replace the rapid-inter borough transit the subway offers: New York City's buses are the slowest in the nation, average speeds of just 7.4 miles per hour, and generally do not offer 24/7 service. ¶¶ 15–16. The difference between the two is particularly acute for passengers who use wheelchairs, as they must be strapped and secured by a driver whenever they take the bus, resulting both in additional delays and loss of independence. SOF ¶ 17. The segregated Access-a-Ride ("AAR") program is arguably even more inadequate. Not only does the program require reservations "one to two days in advance," but it also lists maximum ride times of more than an hour for a three to six mile trip and considers a wait up to 30 minutes following a scheduled pickup as "on-time." SOF ¶ 11. AAR's constraints—of which the MTA is well aware—make it a patently insufficient replacement for a service as efficient as the subway. SOF ¶¶ 12–14.

Unfortunately, class members are unable to access fully 76% in most of subway stations because those stations completely lack elevators or other stair-free pathways. SOF ¶ 3. The distance between accessible stations can exceed 30 blocks and several miles. SOF ¶ 4. Of the 122 NYC neighborhoods that are served by the subway system, 62 do not have a single accessible

subway stop. SOF ¶ 5. Further, all but a handful of the 24% of stations that do offer accessibility require passengers who cannot climb stairs to use an elevator to access the trains—in most cases two or three elevators per station. SOF ¶¶ 7–8. Because the majority of these elevators are not redundant, a single inoperable elevator will typically render the entire station inaccessible to class members. SOF ¶ 9. The subway system is thus as inaccessible as it is popular, making the impact of additional access barriers in the form of frequent and unpredictable elevator outages, without alternative backup measures, that much more devastating.

B. Station Elevators Are in an Alarmingly Poor Condition, Causing Pervasive Unplanned and Unnecessary Outages that Deprive Persons with Disabilities of Access to the Subway System

1. The MTA's Inadequate Maintenance of Elevators

a. The MTA Fails to Follow Its Own Preventative Maintenance Program, Leaving the Elevators in a Shocking State of Disrepair

Four separate studies—including two commissioned by the MTA itself—have identified significant deficiencies in the MTA's preventative elevator maintenance practices, negatively impacting reliable service. SOF ¶¶ 34; 42; 46–47. A May 2017 report by the New York City Comptroller found that only approximately one-fifth of the elevators and escalators in the audit sample received all of their scheduled preventative maintenance; that 34% of the 849 scheduled preventative maintenance assignments were not completed timely or at all; moreover in 31% of the instances where preventative maintenance service assignments for sampled machines were canceled, the basis for the cancellations were either not supported or were otherwise not in compliance with the MTA's own Elevator and Escalator ("E&E") policy. SOF ¶¶ 34–37. These findings led the Comptroller to conclude that "[a]s a result of these deficiencies NYCT cannot ensure that its 407 elevators and escalators are presently, and will continue to be, in good operating condition." SOF ¶ 34.

The second MTA-commissioned study, conducted by Vertical Systems Analysis ("VSA"), likewise concluded that key aspects of the MTA's practices implementing its preventative maintenance protocol were lacking and in need of significant improvement to increase elevator reliability. SOF ¶ 42. In particular, VSA urged that "when a problem is found during the monthly maintenance it should be corrected immediately" since "it would increase the reliability if [the problem] was addressed at the time of service." SOF ¶¶ 42–44 (also noting that parts and manuals required for proper preventative maintenance were missing from the majority of job sites). As VSA noted, adequate preventative maintenance corresponds with elevator reliability. SOF ¶ 42. Another MTA-commissioned study, conducted by KPMG, echoed these findings. Emphasizing that "[a] significant proportion of [the MTA's elevator and escalator equipment] have a high probability of experiencing a corrective maintenance event within the next 2 weeks," the KPMG study reinforced the main conclusion of both the Comptroller's and the VSA study: MTA's elevator maintenance program is patently inadequate. SOF ¶ 46.

The findings of the Plaintiffs' expert, Amicus Elevator Consultant ("AEC"), are in line with the conclusions of these three studies. In particular, AEC conducted comprehensive inspections of four MTA subway elevators and documented a multitude of deficiencies at each one. Because these deficiencies would "not exist if proper maintenance [wa]s being performed in accordance with the E&E procedures," AEC concluded that elevator maintenance problems are widespread throughout the system. SOF ¶¶ 47–48.

AEC's elevator inspections and review of accompanying maintenance records revealed that recurring issues at each elevator were addressed solely with stopgap measures, if at all, during routine preventative maintenance—such as E&E maintainers pouring in gallon after gallon of hydraulic fluid rather than fixing leaks. SOF ¶ 51. Indeed, these inspections revealed between 25-53 deficiencies per elevator. SOF ¶ 50. An examination of each machine's

maintenance history and records further revealed that the deficiencies were leading to continual entrapments and breakdowns of each of the four machines surveyed. SOF ¶¶ 50; 53; 56; 60 ("Items identified are clearly not being rectified as part of preventative maintenance."). A number of the deficiencies constitute serious safety hazards—such as the inappropriate installation of a jumper cable to circumvent an important safety feature. SOF ¶ 57; *see also* SOF ¶ 55 (describing how an MTA mechanic inadvertently caused an elevator to crash into the elevator pit because he was unaware it was storing a 2,000 pound test weight due to unreliable record keeping). Overall, the maintenance records for all four machines indicated that there would be fewer shutdowns if the MTA followed proper preventative maintenance procedures, including conducting higher-quality maintenance, because problems "w[ould] be caught before they turn into emergencies." SOF ¶ 61. As is, the system is poorly maintained, resulting in perpetual disrepair and chronic unexpected outages. SOF ¶¶ 48–61.

b. The MTA Does Not Replace Elevators at the Rate Necessary to Keep These Machines in Good Repair

The MTA's failure to conduct sufficient preventative maintenance is further exacerbated by its practice of not replacing elevators at the rate required to keep the machines in a state of good repair. In fact, Mr. Antonio Suarez, the MTA's Elevator and Escalator division chief, has admitted that "[w]e continue to add equipment and fail to acknowledge the need to replace it at the end of its useful life." SOF ¶ 72. Another MTA executive echoed this admission, acknowledging that there "has not been the investment to maintain and reach a state of good repair for all the assets categories" including elevators. SOF ¶ 73. This lack of investment is especially apparent from the MTA's current 2015-2019 Capital Plan, which contemplates merely replacing 16 Accessibility elevators even though Mr. Suarez's 2020-2039 20-year needs assessment recommended that no fewer than 66 such elevators be replaced. SOF ¶¶ 65–66.

KPMG's assessment, discussed in the previous section, sheds additional light on MTA's subpar replacement practices. After examining the MTA's elevator availability data and capital replacement program, KPMG concluded that "under the current operational and asset replacement program … it appears there may be adverse impact on both availability and operational cost performance of MTA." SOF ¶ 71. As KPMG noted, operational availability is lower for older elevators, while operational expenses are higher, in part because "[i]n addition to the impact to increased corrective maintenance and increasing breakdowns, a significant risk is the impact of obsolescence and lack of replacement parts for repair of older machines." SOF ¶¶ 68–69. It is accordingly apparent that the MTA compounds its preventative maintenance struggles by failing to replace outdated elevators at appropriate intervals.

c. The E&E Department Has A Long-Standing, Undisputed Shortage of Necessary Elevator Maintenance Personnel

A large contributor to the problem of chronic elevator disrepair is the MTA's long-standing and ongoing shortage of Elevator and Escalator ("E&E") Maintainers. SOF ¶¶ 19–24. There is no dispute that, at least over the last eight years, the MTA's E&E Maintainer division has never been fully staffed and has operated with as many as 40 vacancies, in large part because the MTA has historically failed to offer maintainers a competitive salary as compared to other public agencies such as the New York City Housing Authority. SOF ¶¶ 20–22. Despite recent, post-filing efforts, the MTA acknowledges that it remains short more than 30 maintainers in their E&E Division. SOF ¶¶ 23–24. As MTA E&E Division Chief Antonio Suarez admits, "[t]he primary reason for elevators and escalators being observed out of service is that NYCT is unable to hire all the authorized maintainers in its budget." SOF ¶ 25. Even when it is able to fill some of these positions, MTA maintainers "rare[ly] have the required skill or training." SOF ¶ 26. The end result is damning: "[a]s a consequence of this difficulty in recruiting and retaining skilled

maintainers […], 80% of our equipment fails within two weeks of our maintainers doing preventative maintenance on that equipment." SOF ¶ 25.

The E&E division's failure to recruit qualified personnel extends to supervisory staff. In 2015, Mr. Suarez made a budget request for more E&E supervisors, noting that the lack of direct managerial oversight during certain shifts was negatively impacting the productivity of field personnel and consequently the availability of elevator equipment during those hours. SOF ¶¶ 28–29. His request for additional supervisors was denied, SOF ¶ 30, and there is no evidence that the problem has since been rectified. By MTA's own admission, the culture resulting from this shortage is that of neglect: In the words of Mr. Suarez himself, "the culture [of the E&E division] is: if you missed the problem during maintenance, or ignore the defect, or maybe break something and keep quiet about it, nothing will ever come of it. We need to change that." SOF ¶ 27. In sum, there is no dispute that the MTA's failure to adequately staff its maintenance program has contributed to the lack of adequate elevator maintenance.

d. MTA Accessibility Elevators Routinely Lack Required Accessibility Features or Are Unusably Dirty

Even when the elevators are technically operable, the MTA further impedes access by neglecting to maintain elevators' key features – such as elevator lights and sounds, emergency communication intercoms, and door signaling devices — consistent with the mandates of the ADA Accessibility Guidelines ("ADAAG") as adopted by the United States Department of Transportation. 36 C.F.R. pt. 1191, apps. B & D. An examination of 61 inspection reports, issued by the MTA's own ADA Compliance Unit, has revealed that, on average, elevators exhibit 2.19 such deficiencies. SOF ¶¶ 79; 88–89. As a result, class members are often unable to determine if a subway elevator is even functioning due to faulty elevator lights, or to call for assistance in the event they find themselves stranded in an inoperable elevator. SOF ¶¶ 153, 160. These

breakdowns pose safety hazards to class members and even deter many passengers with disabilities from even attempting to use the subway.

Nor does the MTA do what is needed to keep elevators from being unusably dirty—including with human excrement. In fact, the MTA considered increasing the number of station cleaners to allow each elevator to be cleaned twice, as opposed to the current once per tour, in response to this lawsuit, but failed to do so. SOF ¶¶ 96–97. Indeed, the MTA openly admits that "for the most part the elevators are not staffed so there is no way to prevent somebody from, you know, urinating in the elevator." SOF ¶ 95. The direct consequence of this neglectful attitude is that class members must routinely choose between rolling into an elevator containing human waste or being functionally stranded at a subway station, a situation that is degrading and discriminatory in itself. *See, e.g.* SOF ¶¶ 136 (Mr. Jones describing repeated instances of cleanliness issues in subway elevators, including one situation where he was delayed for 30 minutes due to the presence of human waste in an elevator); SOF ¶ 161 (class member April Coughlin encountering cleanliness issues at virtually every elevator she rides, including "[f]eces, urine, garbage, lots of dirt"); SOF ¶ 151 (Monica Bartley, the community outreach specialist for the Center for Independence of the Disabled in New York ("CIDNY"), describing a recent encounter with an unsanitary elevator in which she had to roll through feces to avoid being trapped inside the subway system); *see also* SOF ¶ 98 (MTA official admitting that an elevator containing human feces is technically operational but probably not usable by customers).

2. <u>The MTA Has Made Much Greater Efforts to Maintain Non-Accessibility Elevators</u>

The MTA's negligent treatment of the elevators that provide class members with access to the subway system stands in sharp contrast to the MTA's care and concern for elevators that serve customers who can take stairs. These Non-Accessibility Elevators, which are part of the necessary path of travel through deeply underground stations, do not serve class members

because customers must also take one or more flights of stairs to get to the train. SOF ¶ 79. By the admission of NYCT's director of the Office of Management and Budget Aaron Stern, the MTA views Non-Accessibility Elevators with "special concern" because "an outage of those elevators has a greater impact on riders since the elevator is the *primary means of entrance and egress* from the station." SOF ¶ 82 (emphasis added). In other words, the Non-Accessibility Elevators are openly prioritized because "you have to use an elevator to physically get out of that particular station." SOF ¶ 86. It is telling, to say the least, that no such concern is extended to Accessibility Elevators even though they are the primary means of entrance and egress to all subway stations for passengers who cannot use stairs.

The MTA demonstrates its practice of prioritizing Non-Accessibility Elevators in a wide variety of ways. For one, it awarded a $12 million contract to outsource the maintenance of 18 of these elevators in December 2017. SOF ¶ 83. Further, it is replacing all 18 Washington Heights Non-Accessibility Elevators on an expedited basis, and is indeed replaing 26 of the subway system's 44 Non-Accessibility Elevators as part of its 2015-2019 Capital Plan, a rate in sharp contrast with the Accessibility Elevators' replacement rate of 16 in the same 5-year period. SOF ¶¶ 67, 87. No less significantly, as discussed above, the MTA employs elevator operators, who remain in the elevator at all times, for many of their Non-Accessibility Elevators. SOF ¶¶ 84–85.

The MTA's discriminatory focus on Non-Accessibility Elevators is especially evident from the fact that, unlike Accessibility Elevators, they are all redundant, meaning more than one elevator serves the same path of travel. SOF ¶ 80. In other words, if an Accessibility Elevator fails a class member seldom has other options, whereas passengers who rely on Non-Accessibility Elevators can simply use an alternate elevator at that same station to reach their same destination. SOF ¶ 9. Yet the MTA prioritizes replacements, maintainers and elevator operators for their redundant Non-Accessibility Elevators without ensuring similar resources for

Accessibility Elevators, even though the latter provide the sole access to the system for class members. Thus, the MTA's "special concern" for Non-Accessibility Elevators highlights its neglect of Accessibility Elevators.

C. Poor Maintenance Leads to Unpredictable and Pervasive Outages, Preventing Access for Passengers who Rely on Elevators

The inevitable consequence of MTA's wholly deficient maintenance program is frequent, unpredictable outages which results in the regular denial of access for people who rely on elevators. Even the MTA's own expert, Dr. Salzberg, admits that 80% of elevator outages are unplanned. SOF ¶ 33. ("[A]pproximately 20% of the time elevators are out of service is attributable to planned preventative maintenance or planned inspections"). Indeed, in the three-year period covered by the MTA data Dr. Salzberg examined, every single accessible stop in the system experienced a quarter of low elevator availability, well below the median. SOF ¶ 76.[1] Further compounding the problem, there is up to a 45-minute lag time between when an elevator stops working and when the MTA notifies the public about that outage. SOF ¶ 100.

Nor can the MTA claim they are unaware of the general disrepair of subway elevators and the everyday impact of this disrepair. In 2017, the number of complaints the MTA received on the issue of elevator dysfunction totaled 393, up from 371 the prior year. SOF ¶ 91. The MTA admits that the "[m]ajority of these complaints are due to the fact that the elevator . . . has not

[1] The MTA is likely to lean heavily on Dr. Salzberg's claim that the median quarterly elevator reliability is 98%. Caiola Dec. Ex. 1. This meaningless statistic is generated from LiftNet data, yet LiftNet, the MTA's remote elevator monitoring system is so badly outdated that the MTA cannot rely on it. SOF ¶¶ 99–103. Instead, the MTA instructs control desk workers to independently verify each elevator outage before informing the public. SOF ¶¶ 100–01. This antiquated process is so time-consuming and fraught with human error, it routinely fails to produce up-to-date, accurate data or information. SOF ¶ 100. Setting aside Plaintiffs' position that the 98% figure is both faulty and deceptive, it is particularly meaningless for purposes of this motion which focuses on the access barriers caused by MTA's indisputably deficient elevator maintenance program.

been fixed promptly or [the outage] occurs frequently." SOF ¶ 93. Further, "[m]any times the customer complaint notes that the elevator has been out of service for more than 2 weeks (sometimes months)," while "[o]ther complaints note that the customer has gone to another station close by only to find that this elevator too, is out of service as well as the website not being current with which elevators are out of service." *Id*. It is accordingly abundantly clear that the MTA is on ample notice of the many issues besetting its elevator maintenance program.

The result is an elevator system that is so highly unpredictable, delayed, frustrating, and even dangerous as to be frequently unusable for people who rely on elevators. Plaintiff Chris Pangilinan, for example, has kept a detailed log of every elevator outage he has encountered since moving to the City in November 2014, and it shows he has been impacted by an unexpected elevator outage during 14.9% of his trips on the subway system. SOF ¶ 105-106. Other class members are routinely forced to rely on strangers to avoid being stranded within the subway system. Plaintiff Dustin Jones has repeatedly been carried out of stations by the fire department as well as by perfect strangers when outages have made it impossible for him to get out of stations on his own. SOF ¶¶ 132–134.[2] Similarly, Plaintiff Sasha Blair-Goldensohn recalls an instance when, while on his way to pick up his kids from school, he encountered a handwritten note next to a station elevator advising him that both of the elevators needed to reach the street were out-of-service. SOF ¶ 125. On that occasion, Mr. Blair-Goldensohn had to

[2] On one especially humiliating occasion, Mr. Jones approached an MTA station agent for assistance after becoming stranded at the station due to an unexpected outage and was merely told to get back on the subway and travel to the next station. When Mr. Jones informed the station agent that the next station was not accessible, the agent replied "what do you want me to do?" and walked away. Mr. Jones ultimately had to plead with fellow passengers for assistance, facing the indignity of having to assure them that he was not begging for money, but merely seeking help out of the station so he could go to a meeting. SOF ¶¶ 133–134.

threaten to call 911 in order to receive assistance with exiting the station from the in-station MTA police officer. *Id.*

Plaintiffs routinely experience significant delays in their travels. On numerous occasions, Mr. Jones has wasted hours of his time because he was forced into long detours on account of elevator outages. SOF ¶ 131. As just one example, Mr. Jones recently experienced an unexpected outage while attempting to travel from the Fulton St Subway Station to 14 St-Union Square Station. He ultimately had to wheel .7 miles in the cold to complete what would have been an eight-minute subway trip for an able-bodied passenger. *Id.*: *see also* SOF ¶ 139 (Plaintiff Chris Pangilinan describing an incident where an unexpected elevator outage resulted in a 45-minute wasted round trip after attempting to run a routine errand).

The risk of becoming stranded and/or expending significant time on detours is heightened by the frequently inaccurate and delayed elevator status information the MTA provides. Although she typically checks the MTA's elevator status information before each trip, Ms. Bartley routinely encounters malfunctioning elevators. SOF ¶ 151. And because her motorized wheelchair cannot be carried up subway stairs, Ms. Bartley endures long, circuitous detours whenever she is stranded by an out-of-service elevator. *Id*. For example, she once encountered an unexpected outage causing her to be unable to exit the system at the end of what should have been a 10-minute subway trip; because of this, Ms. Bartley had to re-board the subway, travel back to her original station, and then board a bus, eventually arriving at her destination two hours later. *Id*. Experiences of Christina Curry and the Harlem-based residents with disabilities she assists through her organization Harlem Independent Living Center ("HILC"), are no different. SOF ¶¶ 140–43. The MTA's inaccurate reporting of elevator status has even deterred some class members from attempting to rely on the MTA's notification system at all. SOF ¶ 107.

Lastly, subway elevators are not only unreliable and unpredictable, but unsafe. According to the MTA's own data, in 1,574 days from December 19, 2013 through April 10, 2018, there were 4,812 entrapments—an average of more than three daily instances of passengers being trapped in MTA elevators. SOF ¶ 78. Class members' experiences reflect this data. Plaintiff Christina Curry, the HILC director, testified about several constituents who were stuck in Accessibility Elevators within the past year alone. SOF ¶¶ 140, 143 (stating that she was also temporarily entrapped inside a subway elevator and was assisted by fellow passengers who managed to pry the door open). Plaintiff Sasha Blair-Goldensohn worries about the possibility of entrapment every time he enters a subway elevator given their poor condition; experiences like watching a group of people, including several children, have to be rescued by emergency personnel from a stuck elevator further heighten concerns. SOF ¶ 124. The barriers regularly encountered by class members in the subway system is, in short, ongoing and severe.

In fact, many class members are deterred from riding the subway altogether solely because of the condition of subway elevators. Although she would greatly prefer to use the subway, Ms. Bartley relies on the significantly more time-consuming AAR to commute from her home in Brooklyn to CIDNY's offices near Union Square because the subway elevators break down too frequently to allow her to get to work on time on a consistent basis. SOF ¶ 150 (also explaining the limited flexibility stemming from AAR's advance requirements for ride reservations). Class member Grace Agalo-Os initially took the subway daily to John Jay College; however, because she soon grew tired of being late for class, spending money on taxis due to outages, and having to beg strangers for assistance when stranded and subsequently switched to AAR as well. SOF ¶ 152. Class member Karin Willison, a power wheelchair user from Indiana, relies on an expensive rental car whenever she visits New York because she cannot afford to waste her limited time in the City on detours caused by elevator outages. SOF ¶¶ 154–57

(recalling her first trip to the City when she attempted to take the subway to Battery Park but ultimately had to travel back to her origin station and then take an hour-long bus to reach her destination thanks to an elevator outage).

Other subway systems, such as the Washington Metropolitan Area Transit Authority ("WMATA") and Massachusetts Bay Transportation Authority ("MBTA") make greater efforts to accommodate passengers when impacted by elevator outages, such as by providing shuttle service for passengers with disabilities who are inconvenienced by an elevator outage. SOF ¶ 111. The MTA, however, has never even considered routinely providing alternative transportation to customers who are stranded by sudden outages, or even making announcements about out-of-service Accessibility Elevators. SOF ¶¶ 108–10.

Overall, the MTA's policy of indifference results in frequent and unexpected outages; hazardous situations in which passengers have to beg strangers to help them out of stations; significant losses of time due to unplanned-for detours; elevator status information that is delayed and often incorrect; station agents that sit in high booths and are unable to assist or even direct stranded passengers; and signs that are confusing, wrong, posted too high for wheelchair users, or absent altogether. As such, the MTA's failure to maintain its elevators and other policies, acts, and omissions, are virtually guaranteed to, and indeed do, exclude passengers with disabilities from meaningful access to the subway system, making their daily lives immeasurably more challenging than they would otherwise be.

IV. LEGAL STANDARD

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986) (noting that "the nonmoving party must come forward with 'specific facts showing that

there is a *genuine issue for trial*" in order to survive a motion for summary judgment) (quoting Fed. R. Civ. P. 56(e) (italics in original). When a plaintiff demonstrates that there is no genuine issue of material fact as to the defendant's liability, the court may grant partial summary judgment on liability and later address remedies. *See*, *e.g.*, *Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189 (2d Cir. 2014) (affirming grant of summary judgment on liability followed by subsequent order of remedial plan for systematic barriers to poll site access for voters with mobility and vision disabilities).

V. LEGAL ARGUMENT

A. The MTA's Poorly Maintained Elevators and Non-Existent Backup Procedures Bar Access to the New York City Subway System in Violation of the ADA and Section 504

Despite repeated pleas from the disability community, the MTA has neglected and continues to neglect maintenance of the scarce Accessibility Elevators that provide hundreds of thousands of passengers critical access to the subway. Moreover, the MTA does virtually nothing to assist passengers stranded by the resulting frequent and unpredictable outages. The result is the unlawful, systemic exclusion of passengers with disabilities from the subway system, in violation of the ADA and Section 504.

1. Federal Law Requires the MTA to Maintain Elevators and Backup Procedures Sufficiently to Provide Meaningful Access to the New York City Subway System to People with Disabilities Who Rely on Elevators.

Passed to "remedy widespread discrimination against disabled individuals," and combat the historical tendency to "isolate and segregate individuals with disabilities*," PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674–75 (quoting 42 U.S.C. § 12101(a)(2)), the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 504 likewise

prohibits programs and activities receiving federal financial assistance from excluding, denying benefits to, or discriminating against "otherwise qualified" individuals with a disability. 29 U.S.C. § 794(a). Courts consider the merits of these claims together as they have nearly identical standards. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003) (internal citations and quotations omitted).

There can be no material dispute that (1) Plaintiffs and the class are qualified individuals with disabilities; (2) the MTA is subject to the ADA Title II and Section 504; and (3) Plaintiffs and the class have been and are being denied the opportunity to participate in or benefit from the MTA's services, programs, or activities—the subway system—or are otherwise discriminated against by the MTA because of their disability. *See Disabled in Action*, 752 F.3d at 196–97. Indeed the MTA has admitted that the first two prongs of this test are met. Declaration of Michelle Caiola ("Caiola Decl.") Ex. 57.

Discrimination under these laws includes not only action, but failure to act: [r]ecognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility." *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (citing 42 U.S.C. § 12131(2)). Further, the ADA requires not only that people with disabilities be provided with access to public services, but that they be provided with meaningful access. *Alexander v. Choate*, 469 U.S. 287, 301 (1985); *see Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 640-41 (S.D.N.Y. 2013). "Individuals may be deprived of meaningful access to public programs due to architectural barriers or a public entity's failure to modify existing facilities and practices." *Disabled in Action*, 752 F.3d at 197. Moreover, in this Circuit, plaintiffs need only "suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits" to shift the burden to defendant to show that

the accommodation is unreasonable. *Henrietta D.*, 331 F.3d at 280 (quoting *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995)).

The ADA's implementing regulations make clear that one of the accommodations that must be offered is adequate maintenance of accessible features—including elevators. Entities providing transportation services must maintain "those features of facilities . . . that are required to make . . . facilities readily accessible" in "operative condition," *see* 49 C.F.R. § 37.161(a). To comply, "[a]ccessibility features shall be repaired promptly" and individuals with disabilities are entitled to reasonable accommodation while the repairs are ongoing. 49 C.F.R. 37.161(b). Any pattern of unreliable elevator service, including regular unscheduled outages unrelated to maintenance or repair, constitutes an ADA violation. *See* 49 C.F.R. § 37.161(c) (only "isolated or temporary interruptions in service or access due to maintenance or repairs" are permissible).

In a case strikingly similar to this one, *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1083–84 (N.D. Cal. 1997), the court emphasized: "The only limitation on liability specified in the regulations is the exception for temporary or isolated interruptions due to maintenance or repairs." *Id.* at 1084 (citing 49 C.F.R. § 37.161(c)). The court ruled that plaintiffs were thus likely to prevail in their claim that the transit authority was discriminating in violation of disability law, notwithstanding the elevators' reported overall reliability rate of 97 percent: Evidence showed that there were "pervasive problems with [those] elevators," limiting everyday access for people with disabilities to an unacceptable degree. *Cupolo*, 5 F. Supp. at 1085 (granting preliminary injection based on "pervasive pattern of neglected maintenance").

Plaintiffs and the class are people with disabilities who are entitled to meaningful access to the New York City subway system. Because the MTA does not maintain its accessible features—the elevators—the MTA is liable for violating the ADA and Section 504.

2. The MTA's Pervasive Neglect of Subway Elevators Results in Frequent, Unpredictable Outages and Unusable Elevators, Barring Meaningful Access to the Subway System

The MTA's failure to ensure appropriate maintenance of Accessibility Elevators violates the implementing regulations' mandate to ensure "operative condition" of "those features of facilities … that are required to make … facilities readily accessible*," see* 49 C.F.R. § 37.161(a). The pattern of pervasive neglect is strikingly similar to the one in *Cupolo*, 5 F. Supp. 2d at 1085. In particular, the undisputed evidence shows that Defendants do not perform scheduled preventative maintenance the *majority* of the time—failing to follow their own program. SOF ¶¶ 35-36. They do not have the personnel they admit they need, at least in part because they do not pay a competitive salary. SOF ¶¶ 19-25. They do not replace Accessibility Elevators at anything remotely approaching the rate needed to maintain them in a state of good repair. SOF ¶¶ 65–66. They do not take easily available steps to prevent these elevators from becoming unusably dirty. SOF ¶¶ 94–97. The resulting access barriers are accordingly a clear consequence of the MTA's "failure to modify existing … practices" as required under the meaningful access standard. *Disabled in Action*, 752 F.3d 189, at 197. Such failure contrasts sharply with the effort and investment made for Non-Accessibility Elevators, demonstrating that the MTA knows how to and is quite able to maintain subway system elevators when it so chooses. SOF ¶¶ 82–87.

The resulting state of disrepair of Accessibility Elevators cannot be disputed. There is indeed an accumulation of corroborating evidence that this disrepair extends far beyond "isolated or temporary interruptions in service or access due to maintenance or repair." 49 C.F.R. § 37.161(c). The evidence, among others, encompasses:

- The MTA's own expert's admission that unplanned outages, rather than preventative maintenance or planned inspections, account for 80% of the Accessibility Elevator downtime for the MTA. SOF ¶ 33.

- The MTA's own data revealing an average of over three entrapments per day in the period between December 2013 and April 2018, SOF ¶ 78.
- The MTA's own ADA compliance inspections' finding that there are, on average, 2.19 ADA-related deficiencies per elevator. SOF ¶ 89.
- The fact that nearly 400 customer complaints, the vast majority of which concerned improperly functioning elevators, were filed in 2017 alone. SOF ¶¶ 91-93 .
- The 2017 New York City Comptroller study's finding that only 20% of elevators and escalators received all preventative maintenance, while no more than 34% of the 849 scheduled preventative maintenance assignments were completed timely or indeed at all. SOF ¶¶ 32-36.

These facts, taken together with class members' real life experiences, amply attest to MTA's "pattern of pervasive neglect" even stronger than the pattern the court condemned in *Cupolo*.

It is especially telling that the results of the Comptroller's study, discussed above, are corroborated by several additional studies, two of which were commissioned by the MTA itself, and that there is no contrary evidence in the record. In particular, the New York City Comptroller's finding that the MTA failed to comply with its own preventative maintenance program for 80% of audited elevators is supported by the findings of the VSA, KPMG, and AEC reports. SOF ¶¶ 34; 42; 46; 48. The record contains no admissible evidence to dispute these studies' conclusions because the MTA's proffered elevator expert failed to inspect MTA elevators or review any maintenance records. *Mem. of Law in Supp. of Pls' Mot. to Exclude Expert Test. of Dennis W. Olson*, filed herewith.

Perhaps most importantly, Plaintiffs' own experiences powerfully demonstrate the ongoing exclusion they suffer thanks to MTA's neglect of Accessibility Elevators. Each

member's experience is indeed a key testament to the everyday realities of trying to access a system whose elevators, scarce in number to begin with, are so frequently either out of order without prior warning or otherwise essentially inoperable thanks to key components' high failure rate. Among other things, class members have experienced being trapped inside stations and having to rely on complete strangers to carry them and their wheelchairs out into the streets; not being able to call for help while stuck inside elevators thanks to accessible features' inoperability; having to give up on using elevators that were supposedly in service because a feature such as the doors was not functioning properly; and having to wait on assistance because the elevator was so soiled as to be effectively unusable. SOF ¶¶ 124-26, 132–136, 140, 142–43; 153. In short, when class members attempt to take advantage of the subway service, they can frequently only do so with the assistance of other people. Partial access with the help of outside assistance is not meaningful program access. *See Disabled in Action*, 752 F.3d at 199-200 (noting that although the plaintiffs were able to vote with the "fortuitous assistance of others, the purpose of the Rehabilitation Act is 'to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society") citing 29 U.S.C. § 701(b)(1).

Contrary to its obligation to give priority to ways of offering services "in the most integrated setting appropriate," *Disabled in Action*, 752 F.3d at 198 (quoting 28 C.F.R. § 35.150(b)(1)), the MTA spends $450 million per year—about $70 per trip—on the inferior and segregated AAR program. SOF ¶ 11. Relegating passengers to this expensive and sub-par system because of disabilities that inhibit their use of stairs, rather than providing an accessible subway, is a clear act of discrimination. *See Cupolo*, 5 F. Supp. 2d at 1084. Thus, as in *Brooklyn Center for Independence of the Disabled v. Bloomberg*, the MTA fails to do what is needed to ensure meaningful access to people with disabilities.

Finally, compounding the barriers caused by MTA's patently deficient elevator maintenance program, the MTA fails to comport with the mandate to ensure reasonable accommodation while elevator repairs are ongoing. *see* 49 C.F.R. 37.161(b), not even taking simple measures other systems offer like on-demand shuttles during elevator outages. SOF ¶¶ 109–11. Indeed, MTA has not even bothered to upgrade its aged and faulty LiftNet system to ensure the provision of timely information regarding outages, currently resulting in confusing, unreliable information about the 80% of outages that are unplanned. SOF ¶¶ 33; 99–101. The MTA's refusal to provide even the most basic of alternative accommodations during the frequent, unpredictable outages in the subway system is in itself a violation of the ADA and Section 504—a violation that exacerbates the exclusionary effects of its underlying failure to maintain the elevators.

Altogether, "the pervasive pattern of neglect" — as reflected by the lack of programmatic maintenance combined with the complete absence of accommodation in the all-too-frequent case where an elevator is either out of order or effectively unusable — clearly attests to MTA's blatant violation of the meaningful access standard. That the subway system -- replete with these unnecessary and correctable barriers[3] -- offers few elevators to begin with only underscores the grim realities faced by elevator-dependent passengers. The totality of these objective facts compels a finding of liability.

B. The MTA's Systemic Exclusion of People with Disabilities from its Subway System Violates the NYCHRL

It is well established that the New York City Human Rights Law ("NYCHRL") is broader than its federal counterparts. *See*, *e.g.*, *Ya Chen Chen v. City Univ. of N.Y.*, 805 F.3d 59,

[3] As demonstrated by the "special-care" applied to Non-Accessibility elevators, MTA demonstrates that it is fully aware and capable of remedying the barriers faced by riders with disabilities.

75 (2d Cir. 2015) ("[I]nterpretations of state and federal civil rights statutes can serve only as a floor below which the [NYCHRL] cannot fall.") (quoting The Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85, § 1 (2005) ("Restoration Act")). Courts must conduct a separate analysis from federal law and give the NYCHRL liberal construction "for the accomplishment of the uniquely broad and remedial purposes" of the law. *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013) (quoting Restoration Act § 7).

Accordingly, even if the MTA was not liable under the federal law – and it is – it would still be obligated to remove the barriers in question under the NYCHRL.[4] It would indeed be fundamentally at odds with the local law's expressly articulated "uniquely broad and remedial purposes" to hold that the MTA has no obligation to safeguard access to one of its most vital services for passengers with disabilities.

Here, the MTA's conduct violates NYCHRL's mandate to provide full and equal access to public accommodations on the basis of disability. *See* N.Y.C. Admin. Code § 8-107(4)(a) (making it "an unlawful discriminatory practice" to deny "full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation" on the basis of "actual or perceived . . . disability," whether the denial is done "directly or indirectly"). This provision reaches both defendants as providers of a public accommodation and subway stations as places of public

[4] The MTA is subject to the requirements of the NYCHRL, including with respect to subway access, as the New York State Supreme Court just affirmed. *See* Decision and Order, *Ctr. for Independence of the Disabled, N.Y. v. Metro. Transp. Auth.*, No. 153765/2017 (N.Y. Sup. Ct. June 5, 2019) (attached as Caiola Dec. Ex. 80), *notice of appeal filed* (Jun. 28, 2019); *see also Levy v. Comm'n on Human Rights*, 85 N.Y.2d 740 (1995) (holding New York City Transit subject to the NYCHRL in employment discrimination case); *Bumpus v. New York City Transit Auth.*, N.Y.S.2d 99, 109–10 (2d Dep't 2009) (same, in public accommodation discrimination case).

accommodation. N.Y.C. Admin. Code § 8-102. In addition, the MTA's lack of proper elevator maintenance violates NYCHRL's reasonable accommodation provision. *See id.* § 8-107(15) (mandating reasonable accommodations unless doing so would pose undue hardship).

The NYCHRL requirement to ensure equal access to the subway system, including through reasonable accommodations, cannot be limited by federal law. For example, the definition of reasonable accommodation is broader under the NYCHRL that it is under the ADA and Section 504, and the showing required to shift the burden onto the defendant to demonstrate undue hardship is even lower than the analogous requirement under federal law. *Phillips v. City of New York*, 884 N.Y.S.2d 369, 378 (1st Dep't 2009). Further, the NYCHRL requires "full and equal access, on equal terms and conditions," § 8-107(4)(a)(2)(a), a mandate that is broader than the already expansive federal "meaningful access" standard. *See Henrietta D.*, 331 F.3d at 277-78 (discussing federal meaningful access standard). Accordingly, even in the event that the MTA's abysmal maintenance program passes muster under federal law—and it does not — summary judgment on liability would be warranted under the broader NYCHRL.

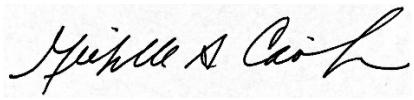
VI. CONCLUSION

Rampant access barriers caused by the MTA's longstanding, systemic failure to implement programmatic maintenance and provide help when a station elevator is unavailable, effectively exclude customers whose disabilities prevent them from using stairs from meaningful access to the MTA's subway program. Because both federal and city law obligate defendants to provide such access for each of the programs they run, the MTA's conduct is in clear violation of ADA, Section 504 and the NYCHRL. Plaintiffs accordingly respectfully request that this Court grant their application for a partial summary judgment on liability under each of the enumerated statutes.

Dated: August 9, 2019
New York, New York

Respectfully submitted,

DISABILITY RIGHTS ADVOCATES



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